AGNES MAYO MOORE (ON JUDICIAL REMAND)

IBLA 85-280 Decided April 26, 1988

Reconsideration of Agnes Mayo Moore, 91 IBLA 343 (1986), on remand from the United States District Court for the District of Alaska. F 13514.

Agnes Mayo Moore, 91 IBLA 343 (1986), vacated; BLM decision reversed.

1. Alaska: Generally--Alaska: Land Grants and Selections--Alaska: Native Allotments--Alaska: Trade and Manufacturing Sites--Segregation

The mere filing of a notice of location for a trade and manufacturing site creates no rights in the land, and, without more, does not create in the one filing an interest in the land as against a subsequent applicant so as to subject the subsequent application to rejection.

APPEARANCES: Mark Butterfield, Esq., Anchorage, Alaska, for appellant; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, U.S. Depart- ment of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

This case is now before the Board as a result of an order issued by the United States District Court for the District of Alaska granting voluntary remand of the case upon a motion filed on behalf of the Department of the Interior. The case had been before the Court after appeal from a decision by this Board entitled Agnes Mayo Moore, 91 IBLA 343 (1986). In that decision this Board affirmed a December 18, 1984, decision of the Fairbanks District Office, Bureau of Land Management (BLM), rejecting appellant's Native allotment application with respect to that tract described as "parcel C."

The Court order remanded the case to the Department of the Interior to allow:

1. The Interior Board of Land Appeals ("IBLA") to reconsider its determination that no hearing was required prior to the reci- sion of the approval by [BLM] of June 30, 1978 of [appellant's] application for a Native Allotment;

2. [Appellant] to seek reconsideration before the IBLA on the grounds that BLM did not have the authority to vacate its June 30, 1978 approval of [appellant's] application for a Native allotment; and

3. To permit the IBLA to issue a decision on those issues detailed above and any other issue that may be properly raised, including whether the lands for which [appellant] has submitted an application for an allotment were available for allotment at the time she alleges to have commenced the prerequisite use of those lands.

Court order, Moore v. Hodel, Case No. A87-082 Civil, dated July 21, 1987.

Following remand, counsel for BLM filed a request for remand of the case to BLM. The stated purpose of the request was to "allow BLM an oppor- tunity to factually adjudicate the segregative effect of the Trade and Manufacturing Site application on the allotment application." Appellant has filed a brief in opposition to the BLM request for remand. The court directive precludes our remanding this case. In addition, we cannot merely remand the matter by reason of the issuance of our prior decision. If we were to merely remand, without reconsidering our prior decision, and BLM were to vacate or reverse its prior decision, BLM would be taking action contrary to a Board decision issued on behalf of the Secretary, pursuant to the provisions of 43 CFR 4.1. We must therefore reconsider our previous decision prior to any consideration of a grant of remand.

In Agnes Mayo Moore, supra, the Board affirmed a December 18, 1984, decision vacating a June 30, 1978, decision which approved appellant's Native Allotment application as to parcel C. In its 1984 decision BLM stated that

> [a]t the time Ms. Moore entered the lands within parcel C * * * they were embraced within Trade and Manufacturing Site (T&M) application F-031248 and segregated from the initiation of rights under the Native Allotment Act until its removal from the records. Therefore the lands within parcel C were not unreserved on December 13, 1968, * * *."
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> Native allotments in Alaska can be granted only for vacant, unappropriated, and unreserved nonmineral land. An application for land withdrawn from entry is nugatory and cannot be given life. See Paul P. Tony, 43 IBLA 245 (1979). No rights may be initiated under the Alaska Native Allotment Act by occupation and use of lands not open to appropriation. See David Capjohn, et al, 14 IBLA 330 (1974).
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> As the lands within Parcel C were segregated from appropria- tion by the T&M Site application * * *, the application must be and hereby is rejected.

In her statement of reasons in the initial appeal, appellant argued that the date she had commenced occupancy and use of the land as stated on her application was incorrect and urged the Board to allow her to amend the application. The Board found that even if the earlier date were used, appellant commenced use and occupancy after the T&M application segregated the lands and found no issue of fact which would require the Board to direct a hearing to be held prior to an affirmation of the BLM decision. Agnes Mayo Moore, supra at 347.

[1] In her brief filed on remand, appellant has raised the issue of the effect of filing a T&M Site application on appellant's ability to commence use and occupancy in order to fulfill the requirements of the Native Allotment Act, and cites Margaret L. Klatt, 23 IBLA 59 (1975), in support of her argument that the application did not preclude her initiation of a Native Allotment application. We find that case to be in point.

> The mere filing of a notice of location for a trade and manufac- turing site creates no rights in the land, "the establishment of such rights being entirely dependent upon the acts performed in occupying, possessing and improving the land and their relationship to the requirements of the law under which the settler seeks to obtain title. * * * ." Vernard E. Jones, 76 I.D. 133, 137 (1970). Elden E. Reese, 21 IBLA 251 (1975). (Footnote omitted.)

Margaret L. Klatt, supra at 62. Therefore, "the mere filing of a notice of location of a T&M Site claim, without more, does not create in the one filing an interest in the land as against a subsequent applicant so as to subject the subsequent application to rejection. Loran John Whittington, Chester H. Cone, A-28823 (August 18, 1961)." Peter Pan Seafoods, Inc. v. Shimel, 72 I.D. 242, 245 (l965); Margaret L. Klatt, supra at 62-63. 1/

The application filed by appellant was rejected because appellant com- menced her use and occupancy at a time when the lands were subject to the T&M Site application. The filing of a T&M Site application for the same lands would not in and of itself preclude appellant's use and occupancy, and thus could not be used as a basis for the rejection of appellant's application.

In light of the determination above, we do not deem it necessary to address the other issues raised in the appellant's brief on remand. To the extent they may have bearing on the decision BLM will make, these issues may

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1/ The "notation" or "tract book" rule has been applied to uphold the seg- regative effect of certain forms of applications for an interest in Federal lands, such as state selections, which are afforded segregative effect by statute or regulation. Shiny Rock Mining Corp. v. Hodel, 825 F.2d 216 (9th Cir. 1987); Cavanagh & McCarthy v. Hodel, ___ F. Supp. ___, (D. Alaska 1988). However, that rule does not apply in this case, as the filing of a T&M Site application does not segregate the land from subsequent entry. Margaret L. Klatt, supra at 63-64; see Maurice E. DeBoer, 91 IBLA 317 (1986); Basil S. Bostridge, 90 IBLA 54 (1985).

now be addressed by BLM, and, if an adverse decision is rendered by BLM, the issues may again be raised on appeal from that decision.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, this Board's decision in Agnes Mayo Moore, 91 IBLA 343 (1986), is vacated, the December 18, 1984, decision of the Fairbanks District Office, BLM, is hereby reversed, and the matter is remanded to BLM.

R. W. Mullen
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Will A. Irwin
Administrative Judge